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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM JOEL PETTY,

Defendant and Appellant.

B204577

(Los Angeles County
Super. Ct. No. KA078772)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Douglas W. Sortino, Judge. Affirmed.

Robert H. Pourvali, under appointment by the Court of Appeal, for Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Lawrence M. Daniels, Supervising Deputy Attorneys General, and Susan Sullivan Pithey, Deputy Attorney General, for Respondent.

INTRODUCTION

A jury convicted appellant of unlawfully taking or driving a vehicle. He claims the trial court (1) violated his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) by imposing an upper term sentence, and (2) abused its discretion in failing to strike one of his prior felony convictions. These contentions have no merit. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Samir Abdellatif was working at his used car dealership in Pomona on April 6, 2007. He got into his Toyota Camry to drive to a car auction and started the engine. Before leaving, he got out of the car while it was still running and ran to the dealership office to make sure it was locked. About 45 seconds later, when Abdellatif returned to the location where he had parked his car, it was gone. Abdellatif had a leather bag in his car containing his social security card, a department store credit card, and some of his wife's jewelry.

On April 10, 2007, Pomona Police Officer Dolgovin responded to a call regarding a theft that had occurred the previous night in a Pomona surplus store. The victim, Victor Ayala, gave Officer Dolgovin a wallet that had been left behind by the suspect. Among the contents in the wallet were two Kohl's credit cards inscribed with Abdellatif's name.

The next day, after Officer Dolgovin determined the cards belonged to Abdellatif, he learned Abdellatif's stolen Camry had been involved in a traffic stop. When Officer Dolgovin arrived at the scene of the traffic stop, he found appellant sitting on the curb with handcuffs. Ayala was brought to the location and identified appellant as the surplus store thief. Ayala also identified the Camry as the one in which appellant fled from the store. In addition, a briefcase was found in the Camry containing papers with Abdellatif's name.

Appellant was convicted by a jury of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), but was acquitted of second degree robbery and petty theft with a prior. The trial court found true three prior conviction allegations under the Three

Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)¹ The court also found true five prior prison term allegations. (§ 667.5, subd. (b).)

Prior to the sentencing hearing, appellant filed a motion to strike his “strike” priors pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). In response, the People requested a “second strike” sentence because of the District Attorney’s policy of not pursuing a third strike sentence in cases involving a conviction for a nonviolent, theft-related offense. The court exercised its discretion to strike two of appellant’s three prior felony convictions. It then sentenced appellant to a total prison term of 13 years, consisting of the upper term of four years, doubled under the Three Strikes law, plus five years for the prior term enhancements.

Appellant appeals from the judgment.

DISCUSSION

1. The Trial Court Did Not Err in Imposing the Upper Term.

Appellant claims the trial court’s decision to impose the upper term was based on factors not determined by a jury, as required by *Cunningham*. This claim has no merit.

In January 2007, the United States Supreme Court held California’s determinate sentencing law (DSL) was unconstitutional insofar as it denied a defendant the right to a jury trial on aggravating factors relied upon to impose an upper term sentence of imprisonment. (*Cunningham, supra*, 549 U.S. 270.) In March 2007, the California Legislature passed Senate Bill 40 (SB 40) (Stats. 2007, ch. 3, § 2) as urgency legislation intended to bring the DSL into compliance with *Cunningham*’s requirements. SB 40 amended section 1170, subdivision (b) to provide that “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the

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Future code references are to the Penal Code, unless otherwise indicated.

probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected" (§ 1170, subd. (b).)

SB 40 thus made three basic changes to the procedure for imposing a determinate term of imprisonment: (1) the middle term was no longer the presumptive term in the absence of aggravating or mitigating circumstances; (2) the trial court was given broad discretion to impose the lower, middle or upper term, based upon which best served the interests of justice; and (3) the trial court was required to set forth reasons for imposing the chosen sentence, but it was not required to make findings of fact to justify the sentence chosen. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 843-845; Cal. Rules of Court, rules 4.406, 4.420, 4.421 & 4.423.)

The trial court sentenced appellant on December 7, 2007, *after* SB 40 took effect. Thus, the upper term was the statutory maximum under *Cunningham*, and the trial court was not required to find facts in order to impose the upper term. Instead, the trial court was required to state reasons. In compliance with SB 40, the trial court stated the upper term was the appropriate sentence for appellant because (1) he had "engaged in a pattern of violent conduct which is a danger to the community" based upon his numerous prior convictions, and (2) he was "on parole at the time of this offense" and his "prior performance on parole or probation was not good." Accordingly, the trial court's sentence in compliance with SB 40 did not violate appellant's federal constitutional rights under *Cunningham*.

2. The Trial Court Did Not Abuse Its Discretion Concerning the Felony Prior.

Appellant also contends the trial court abused its discretion in refusing to strike his 1999 conviction for robbery. We cannot agree.

Under *Romero*, a defendant who is subject to a second or third strike may move the court to “strike” the prior conviction in the interests of justice; but the court may do so on its own or in response to the People’s motion. (*Romero, supra*, 13 Cal.4th at p. 504; § 1385; *People v. Barraza* (1994) 30 Cal.App.4th 114, 121, fn. 8.) The decision whether or not to strike a prior felony conviction is subject to the court’s discretion. (*Romero*, at p. 530.)

Our Supreme Court has explained that in order to exercise the discretion afforded to it, a trial court must determine whether “in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The same standard is used by reviewing courts in determining whether the trial court abused its discretion. (*Ibid.*; see also *People v. Carmony* (2004) 33 Cal.4th 367, 376-377 [burden is on party attacking sentence to show sentencing decision was irrational or arbitrary]; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [in absence of showing trial court acted arbitrarily, appellate court must presume trial court acted to achieve legitimate sentencing objectives and may not set aside trial court’s discretionary determination].)

The record in this case shows the trial court was well aware of its discretion under section 1385 and very carefully considered all of the relevant factors, including (1) appellant’s extensive criminal history over 23 years (eight felonies, four involving violence or threats of violence, and at least five prison terms); (2) the fact appellant was acquitted in this case of the more serious offenses of robbery and petty theft with a prior and was convicted of a “standard” nonserious felony; (3) letters submitted on appellant’s behalf; and (4) the court’s belief appellant was motivated to commit the present offense because of his drug abuse. Based upon these factors, the court struck appellant’s 1984 conviction for robbery and his 2002 conviction for assault with a deadly weapon. The court decided, however, that even taking into consideration the mitigating factor of his

drug abuse as the motivating factor of his crimes and the nonserious nature of the present offense, it was inappropriate under *Romero* to strike the third prior conviction because of appellant's extensive criminal history. We conclude the trial court's decision was well within its discretion and that appellant has failed to show it was arbitrary, capricious, or resulted in a manifest miscarriage of justice.

Appellant nonetheless contends the trial court failed to properly consider the nature of his present offense, the fact his 1999 conviction was eight years old, and his drug addiction. This contention is not supported by the record. The trial court's exercise of discretion was undoubtedly the result of individualized consideration of appellant's background and present circumstances. The court properly took into account appellant's overall record and his recidivism. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338-339 [a long and continuous criminal history supports refusal to strike a prior conviction, even if is remote in time]; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment].) Based upon the present record, we cannot say the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

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RUBIN, Acting P. J.

We concur:

FLIER, J.

BIGELOW, J.